

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: BAIR HUGGER FORCED AIR
WARMING DEVICES PRODUCTS
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/FLN)

This Document Relates to All Actions

**PRETRIAL ORDER NO. 15:
Bellwether Trial Selection Process**

In Pretrial Order No. 13, the Court ordered the parties to submit a plan for the selection of bellwether cases that will proceed to trial first in this Consolidated Action. Unable to agree on a proposed protocol or criteria, the parties submitted two separate proposals. The Court has considered each proposal. To provide for the selection of representative cases, and in the interests of fairness, efficiency, and justice, the Court hereby adopts the following protocol for the selection of bellwether cases:

1. On December 23, 2016, the Court will randomly select 150 cases from the pool of potential bellwether trial cases. A case is eligible for inclusion in the pool of potential bellwether trial cases in this Consolidated Action if the case was filed in, removed to, or transferred to MDL No. 15-2666 (JNE/FLN) on or before December 19, 2016.
2. On or before January 9, 2017, the parties shall jointly submit to the Court an overview of relevant characteristics or categories to be considered in assessing whether a case is representative of the range of cases in this Consolidated Action.
3. Plaintiffs and Defendants shall each select 16 cases for consideration as bellwether trial cases, choosing exclusively from among the 150 cases randomly selected by the Court. In addition, consistent with the parties' agreement to include Ramsey County, Minnesota, cases in the potential bellwether case pool, Plaintiffs and Defendants shall

each select 1-2 cases from among the related Bair Hugger cases filed in Ramsey County, Minnesota, on or before December 19, 2016.

4. On January 20, 2017, Plaintiffs and Defendants shall each inform the Court of their respective 16-18 nominations (“Nominated Cases”), providing a brief (3-5 sentence) description of each case and why it is an appropriate candidate. Counsel should also identify, for each nominated case, whether it is anticipated that the case might be excluded from the bellwether pool pursuant to Pretrial Order No. 14 and whether any *Lexecon*¹ issues are foreseen. If there is overlap between the parties’ Nominated Cases, there will be no substitutions.
5. Between January 21 and March 1, 2017, for the Nominated Cases, the parties may conduct limited case-specific discovery, including collecting some case-specific records from third parties. The parties may, for example, issue limited subpoenas to hospitals regarding product identification, infection rates, and medical records. Plaintiffs may also serve limited interrogatories regarding any specific details Defendants have regarding the Bair Hugger system used in the plaintiff’s procedure that allegedly resulted in a surgical site infection caused by the Bair Hugger patient warming system, or if specific details are not known, Plaintiffs may request details about the placement of Bair Hugger warming systems, model number(s), and dates of placement at the facility where the plaintiff’s procedure at issue was performed.
6. The parties will meet and confer to seek agreement on the 8 most representative cases among the Nominated Cases, taking into account and aiming to appropriately reflect the various characteristics or categories that the parties identified in the January 9,

¹ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

2017 submission. The parties shall jointly submit the list of 8 cases to the Court by February 10, 2017. To the extent that the parties cannot agree on the full list of 8, Plaintiffs and Defendants shall file separate lists on that date. The parties' submissions should include for each case: the names of the parties, the case number, the law firm representing the plaintiff(s), a brief description of the case, and a paragraph explaining why the case is representative. The parties should also explain why the 8 cases they propose are representative of the range of cases in this Consolidated Action. Responsive letter-briefs may be filed no later than February 20, 2017. The Court strongly encourages the parties to agree on the list of 8 cases, keeping in mind that a primary goal of bellwether trials is to provide useful information to both sides.

7. On or before March 1, 2017, the Court will consider the parties' joint or separate proposal(s) and will determine which of the proposed cases, up to 8, will be included in the Final Bellwether Trial Pool.
8. Within one week of the Court's determination of the cases in the Final Bellwether Trial Pool, Plaintiffs and Defendants may each exercise one strike. The parties shall notify the Court of their strikes no later than March 8, 2017.
9. A protocol for selecting the order of the bellwether trials will be determined at a later date.

IT IS SO ORDERED.

Dated: November 16, 2016

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge